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No. 75-1251

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIE DARDEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner claims that his guilty plea was invalid because the district court advised him of the constitutional rights waived by the plea only after petitioner had stated the factual basis for it.

On March 28, 1974, in the United States District Court for the Eastern District of Michigan, petitioner pleaded guilty to the knowing sale and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to twelve years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). Subsequently petitioner filed a motion under 28 U.S.C. 2255 to vacate sentence and withdraw his guilty plea, alleging that his in-court recitation of guilty acts during the Rule 11, Fed. R. Crim. P., proceedings precluded a voluntary waiver of the constitutional rights that he was thereafter told his guilty plea would waive. The district court denied the motion (Pet. Exh. B), and the court of appeals affirmed (Pet. Exh. A).

During the proceedings leading to the acceptance of petitioner's guilty plea the district court, following the requirements of Rule 11, Fed. R. Crim. P., asked him to relate the acts he had committed, whereupon petitioner described his participation in the sale of heroin alleged in the indictment. The court then advised petitioner of the constitutional rights that would be waived by his guilty plea (Tr. 33-35, 40),[1] and petitioner acknowledged his awareness of those rights and of all possible defenses available to him. Petitioner assured the court that he wished to proceed with his guilty plea (Tr. 41), and the district court, after satisfying itself that petitioner was acting voluntarily and intelligently, accepted it.

This procedure did not vitiate the validity of the plea. Petitioner does not claim that the district court failed to comply with the requirements of Rule 11; or that he did not already know what the effect of his guilty plea would be; or indeed that he would have refused to plead guilty had the court actually iterated his constitutional rights prior to his recitation of guilty acts.[2] Petitioner suggests (Pet. 7) that he "may not have known" that he could have changed his mind about pleading guilty after the court's explanation of his constitutional rights and that any admissions previously made by him could not have been used against him at a subsequent trial (see *Kercheval* v. *United States,* 274 U.S. 220), but petitioner was

[1]"Tr." refers to the transcript of the plea and sentencing proceedings.

[2]Throughout the plea proceedings petitioner was represented by counsel, who at the outset informed the court that petitioner had a full understanding of his constitutional rights (Tr. 31).

assisted at the plea proceedings by counsel whose competency petitioner does not challenge. In these circumstances we submit that petitioner has failed to show a due process denial resulting from the order in which the district court fulfilled its responsibilities under Rule 11.

Petitioner's suggestion (Pet. 7) that this Court lay down a *per se* rule governing the order of proceedings under Rule 11 is unwarranted. This case itself is telling evidence that due process is not denied in every case in which establishment of the factual basis for the plea precedes the court's explanation of the rights waived. Indeed, petitioner suggests no reason to believe that the recitation of guilty acts will result in a defendant's feeling any more "coerced" than any other open-court indication by the defendant of his willingness to plead guilty that precedes the court's explanation of the effect of the plea. "The nature of the inquiry required by Rule 11 must necessarily vary from case to case," and there is no need for this Court to "establish any general guidelines other than those expressed in the Rule itself." *McCarthy* v. *United States,* 394 U.S. 459, 467-468 n. 20.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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